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# According to Our Hearts and Location: Toward a Structuralist Approach to the Study of Interracial Families

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# *According to Our Hearts* and Location: Toward a Structuralist Approach to the Study of Interracial Families

*R.A. Lenhardt\**

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## I. INTRODUCTION: RACE, STRUCTURALISM, AND INTERRACIAL FAMILIES

In February 2012, HBO premiered a documentary film entitled *The Loving Story*, which traced the experiences of Mildred and Richard Loving, the interracial couple from Virginia who famously challenged that state’s antiscegenation law in the 1960s.<sup>1</sup> The film, the only documentary of its sort, was remarkable, in part because it did more than just focus on the litigation that led up to the United States Supreme Court’s landmark decision in *Loving v. Virginia*,<sup>2</sup> which invalidated the Virginia antiscegenation statute and held that laws “restricting the freedom to marry solely because of

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\* Professor of Law, Fordham Law School. I am grateful to Professor Onwuachi-Willig and the editors of *The Journal of Gender, Race & Justice* for including me in this colloquium. I thank my fellow contributors to the colloquium, as well as Michelle Adams and Elise Boddie for helpful comments on this essay. Finally, I am thankful to Fordham Law School, Will Fullwood, and Ramona Ortega for critical research support.

1. *THE LOVING STORY* (Icarus Films 2011). I was fortunate to serve as one of several scholar advisors on this documentary.

2. *Loving v. Virginia*, 388 U.S. 1 (1967).

racial classifications violate the central meaning of the Equal Protection Clause.”<sup>3</sup> The film uses compelling narration and footage of interviews with people from the small Virginia town from which Mildred and Richard hailed—one in which cross-racial intimacy was tolerated, if not accepted—as well as pictures of the couple’s children to provide an intimate glimpse of the Loving’s family life and context.<sup>4</sup> It offers a unique perspective on the social and legal systems that both brought Mildred and Richard together and threatened to tear them apart.<sup>5</sup>

In legal scholarship, such a broad view of the forces and systems affecting the interracial couples at the center of landmark cases is all too rare. Of course, we know something about the practical effects of antimiscegenation laws on couples like the Lovings, who were effectively exiled from Virginia and forced to live for years in the neighboring District of Columbia in order to keep their family intact.<sup>6</sup> We also have good information about the structure, terms,<sup>7</sup> and regulatory effect of antimiscegenation laws where racial categories,<sup>8</sup> but also notions of

3. *Id.* at 12. The decision also invalidated Virginia’s law on due process grounds. *See id.* For more on this element of the Court’s decision, see R.A. Lenhardt, *Perez v. Sharp and the Limits of Loving*, in *LOVING v. VIRGINIA IN A POST-RACIAL WORLD* 73 (Kevin Noble Maillard & Rose Cuison Villazor eds., 2012); R.A. Lenhardt, *Beyond Analogy: Perez v. Sharp, Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839 (2008).

4. *See* Alessandra Stanley, *Scenes from a Marriage that Segregationists Tried to Break Up*, N.Y. TIMES, Feb. 14, 2012, [http://tv.nytimes.com/2012/02/14/arts/television/the-loving-story-an-hbo-documentary.html?\\_r=0](http://tv.nytimes.com/2012/02/14/arts/television/the-loving-story-an-hbo-documentary.html?_r=0). For personal observations of the Lovings’ relationship and the area from which they hailed, see Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of Loving v. Virginia*, 41 HOW. L.J. 229 (1998).

5. *See* Stanley, *supra* note 4.

6. *See generally* PETER WALLENSTEIN, *TELL THE COURT I LOVE MY WIFE: RACE, MARRIAGE, AND LAW—AN AMERICAN HISTORY* (2002) (discussing, *inter alia*, implications of the law banning Mildred and Richard from living as married couple in Virginia).

7. *See* RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 214–43 (2003) (discussing antimiscegenation laws and categories); RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 17–28 (2001) [hereinafter *REGULATION OF RACE AND ROMANCE*] (discussing, *inter alia*, racial categories deployed in antimiscegenation laws); R.A. Lenhardt, *Forgotten Lessons on Race, Law, and Marriage: The Story of Perez v. Sharp*, in *RACE LAW STORIES* 350–52 (Devon W. Carbado & Rachel F. Moran eds., 2008) [hereinafter *Lenhardt, The Story of Perez v. Sharp*].

8. *See, e.g.*, WALLENSTEIN, *supra* note 6, at 133–46 (discussing antimiscegenation laws as efforts to define the color line); Reginald Oh, *Interracial Marriage in the Shadows of Jim Crow: Racial Segregation as a System of Racial and Gender Subordination*, 39 U.C. DAVIS L. REV. 1321, 1329–39 (2006) (discussing, *inter alia*, the role of antimiscegenation law in reinforcing white supremacy and racial categories); Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government’s Regulation of Marriage*, 86 N.Y.U. L. REV. 1361 (2011) (discussing treatment of interracial marriages involving white G.I.s from the United States and Japanese women under United States military law); Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Law in California*, 33 U.C. DAVIS L. REV. 795 (2000) (discussing, *inter alia*, efforts to categorize Filipinos under California law).

intimacy and the normative family are concerned.<sup>9</sup> What we do not yet have is sufficient insight into the legal mechanisms and systems that, alongside or independent of such laws, have operated to shape the experiences of interracial couples and families in the United States. We do not have a full account of the structural elements that limit interracial intimacy, families, and parenting in the United States. Fortunately, Angela Onwuachi-Willig's wonderful new book, *According to Our Hearts: Rhinelander v. Rhinelander and the Law of the Multiracial Family*, begins to close this gap in legal scholarship.<sup>10</sup> Highlighting the experiences of black-white gay and straight couples and families, it focuses on the ways in which law and society more generally "work together to define families and their rights and opportunities by race—especially when those families are multiracial."<sup>11</sup>

*According to Our Hearts'* initial chapters tell the story of Alice Jones, a woman of color, and Leonard Rhinelander, a wealthy, white socialite, who briefly found love in 1920s New York, only to lose it in the most sensationalized way.<sup>12</sup> Leonard, bowing to pressure from a wealthy father unhappy with his mixed-race marriage, filed an annulment suit seeking to invalidate his brief marriage to Alice on grounds that she had, essentially, engaged in "racial fraud"<sup>13</sup> by lying about an issue at the very heart of their relationship—her racial identity.<sup>14</sup> A very public, media-intensive trial ensued, with the primary goal of determining Alice's race and how apparent it should have been to Leonard.<sup>15</sup>

Other texts have explored the *Rhinelander* case and the ugly roots of white supremacy in the northern United States that it helped to reveal.<sup>16</sup>

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9. See generally *LOVING V. VIRGINIA* IN A POST-RACIAL WORLD (Kevin Noble Maillard & Rose Cuisson Villazor eds., 2012) (collecting essays on *Loving* and its impact on notions of race and the normative family); *REGULATION OF RACE AND ROMANCE*, *supra* note 7, at 61–75 (discussing antiscegenation laws as mechanisms for "defining the boundaries of sexual and marital propriety"); Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 *FORDHAM L. REV.* 2733 (2008) (discussing the impact of antiscegenation law on children and notions of family); Kevin Noble Maillard, *The Multicultural Epiphany of Loving*, 76 *FORDHAM L. REV.* 2709 (2008) (discussing the impact of antiscegenation law on children and notions of family).

10. ANGELA ONWUACHI-WILLIG, *ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY* (forthcoming 2013) (manuscript) (on file with author).

11. *Id.* at 8.

12. *See id.* at 27–120.

13. *Id.* at 73.

14. *Id.* at 35–36.

15. *See id.* at 4.

16. See, e.g., EARL LEWIS & HEIDI ARDIZONNE, *LOVE ON TRIAL: AN AMERICAN SCANDAL IN BLACK AND WHITE* (2001); ELIZABETH SMITH-PRYOR, *PROPERTY RITES: THE RHINELANDER TRIAL*,

Arguably none, however, has achieved as complete an account of the legal proceedings that engulfed Alice and Leonard, and essentially ended their brief marriage. Onwuachi-Willig works as an archeologist might, unearthing original case materials to reveal a rare and precious piece of legal history. What emerges is a detailed anatomy of this underexplored case. Careful analysis of items such as the trial transcript and the couple's marriage affidavit provides readers with insight into the legal and social pressures that led Leonard to claim that his wife had misrepresented her race to him and, among other things, forced a humiliated Alice to submit her naked body to the all-white and male jury in order to litigate her blackness.<sup>17</sup>

This foundation enables Onwuachi-Willig to explore important issues and themes concerning twenty-first century mixed-race couples and families in later parts of *According to Our Hearts*. Perhaps foremost among these is the concept of "placelessness."<sup>18</sup> Onwuachi-Willig suggests that, even as more and more people choose "according to their hearts" to enter into loving relationships across racial lines, interracial intimacy remains a context in which place or location still matter very much. This is obviously so in the area of residential housing where, if segregation has not prevented people of opposite races from ever even meeting, interracial couples often find themselves combating discrimination and other exclusionary measures.<sup>19</sup> But it is arguably also true in law. Onwuachi-Willig makes the powerful observation that, rather than directly taking account of interraciality, antidiscrimination law presumes the monoraciality of couples and families.<sup>20</sup> Existing statutes offer clear protections for individuals who might face discrimination on the basis of their own racial identity, but make no provisions whatsoever for discriminatory treatment at "the intersection of race and family," on grounds of one's partner or the interracial character of their relationship.<sup>21</sup>

While Onwuachi-Willig admittedly does not explicitly champion a structure-based inquiry, this Article endeavors to show that this discussion of placelessness and other aspects of her book lend themselves nicely to a discussion of structural racism and its impact on interracial families. Structuralism—a focus on "the cumulative effect of institutional structures and systems on outcomes for institutions, groups, and individuals"—has a

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PASSING, AND THE PROTECTION OF WHITENESS (2009).

17. For a discussion of litigating race, and whiteness in particular, see generally Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century South*, 108 YALE L.J. 109 (1998) (discussing trials in which individuals litigated racial designation).

18. ONWUACHI-WILLIG, *supra* note 10, at 157.

19. *Id.* at 187–90.

20. *Id.* at 194–95.

21. *Id.* at 122.

great deal to offer the study of the interracial family.<sup>22</sup> This Article thus suggests a point of intervention for scholars interested in bringing structuralist insights into the study of race and family. To date, race scholars have begun to productively deploy structuralism to discuss cumulative racial disadvantage and the ongoing, racially segregative effects of government systems and policies.<sup>23</sup> But they have not typically addressed the impact of such systems on intimate choice and family formation. Likewise, some scholars have employed structuralism to explore how law shapes our intimate preferences and opportunities for intimate engagements.<sup>24</sup> Still, scholars of this very exciting work have not yet engaged as fully as they might regarding questions of race. This Article contends that these emergent and somewhat divergent strands of scholarship can nevertheless be brought together in ways that expand our thinking about race, intimacy, and family. *According to Our Hearts* offers a springboard for scholarly contributions trained more specifically on race and the role of government and other institutions in establishing the terms and conditions under which interracial couples and families can love.

Part II of this Article discusses in more detail those elements of the *Rhineland* trial and aspects of twenty-first century life for interracial families that lead Onwuachi-Willig to assert that such families operate within a legal “placelessness”—in a space that does not recognize their interraciality and, in effect, punishes them for being “racial transgressors.”<sup>25</sup> It also explores more closely the claim that existing civil rights law denies interracial families the protections extended to single-race families<sup>26</sup> and Onwuachi-Willig’s concrete proposal to revise employment and housing-related antidiscrimination provisions in Titles VII and VIII of the Civil Rights Act of 1964 in order to make a “place” for interracial families in existing law.<sup>27</sup> Part II applauds Onwuachi-Willig’s proffered solution, but argues that *According to Our Hearts* should ultimately be celebrated for advancing an agenda even more ambitious than the one acknowledged in its

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22. R.A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1540 (2011) [hereinafter Lenhardt, *Race Audits*] (citing Michael B. Katz et al., *The New African American Inequality*, 92 J. AM. HIST. 75, 75–76 (2005)).

23. *Id.* at 1540–41 (discussing work of race scholars). This said, we could expand our focus on such issues even more going forward.

24. See Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1366–73 (2009). See also Russell K. Robinson, *Structural Dimensions of Racial Preferences*, 76 FORDHAM L. REV. 2787 (2008) [hereinafter Robinson, *Structural Dimensions of Racial Preferences*] (bringing a structural lens to racial preferences in online dating).

25. See ONWUACHI-WILLIG, *supra* note 10, at 202.

26. *Id.* at 159, 202.

27. *Id.* at 264–66.

pages. It contends that, by discussing issues such as residential segregation and location, as well as the role of antimiscegenation laws in shaping notions of the normative family, Onwuachi-Willig provides us with a valuable sketch of a structuralist approach to research on interracial intimacy and family. Such an approach is badly needed in legal scholarship, which has not yet fully interrogated matters of interraciality or the systems and structures that either impede or facilitate interracial intimacy and families.<sup>28</sup>

Part III demonstrates the possibilities that the analysis conducted in *According to Our Hearts* holds by offering a brief, structuralism-informed retelling of aspects of the *Rhineland* trial. Onwuachi-Willig properly points to the trial as a unique example of the ways in which processes of racial formation, performance, and identification function to shape ideas about race and normative families.<sup>29</sup> This Part maintains that the trial is very much a story about race and space, even more than Onwuachi-Willig herself acknowledges. It can also be read as a tale of how the geographic and social boundaries that existed in 1920s New York City and its suburbs helped pre-determine the extent to which Leonard and Alice Rhineland could be considered suitable mates. Ultimately, it is also a narrative of how those boundaries made it impossible for the all-white jury and the millions following the trial through tabloid and news reports to see Alice— notwithstanding the fact that she identified primarily as white—as anything other than black. In advancing this alternative rendering of the *Rhineland* saga, I draw on information about race relations in New York City and New Rochelle, New York, the suburb where Alice and her family lived, and where she and Leonard first met.<sup>30</sup> I also rely on research addressing “locked-in” racial segregation<sup>31</sup> and the problem of “racial territoriality” introduced by Professor Elise Boddie in her important 2010 law review article titled *Racial Territoriality*.<sup>32</sup>

Thinking about *Rhineland* as a story about race and space further underscores the importance of that case in legal history. It also builds support for the “structural turn” that I advocate in legal scholarship in this area by demonstrating that a serious focus on the effect of legal systems and structures in this context offers insights that other kinds of analysis simply

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28. See *supra* pp. 102–03.

29. See ONWUACHI-WILLIG, *supra* note 10, at 48–52.

30. *Id.* at 27.

31. See Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 787–88 (2000) (setting forth a model suggesting that “racial disparity [and segregation] may be locked into the market even in the absence of ongoing intentional discrimination or racism”).

32. Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401 (2010).

do not produce.<sup>33</sup> In recognition of these benefits, Part IV asks what a more intentional and sustained focus on structural racial discrimination and its impact on interracial couples and families would look like. After briefly surveying existing research on structuralism by scholars in both the race and intimacy contexts, it provides a rough sketch of how structuralist concerns could be integrated into legal research on interracial intimacy and families. Part V concludes the Article by suggesting the advantages that a focus on structuralism might have for the study of race and family more generally.

## II. CREATING A “PLACE” FOR INTERRACIAL FAMILIES

Legal scholars have devoted insufficient attention to the connection between interracial intimacy and location, or in Onwuachi-Willig’s terms, place.<sup>34</sup> Of course, the forced exile of Mildred and Richard Loving from the small town and state where they grew up—chronicled in the film discussed at this Article’s outset—highlighted this issue in a unique way. Richard Loving also famously did so in urging his lawyer just before the Supreme Court oral argument to “tell the Court I love my wife, and it is just unfair that I can’t live with her in Virginia.”<sup>35</sup> But there are a host of other ways in which the importance of location or place goes unnoticed in existing scholarship.

Inquiries into de jure segregation and the extent to which the legal rules and norms of segregated space helped to facilitate or impede the formation of the loving relationships at the heart of *Loving* and other landmark cases remain shockingly rare.<sup>36</sup> We typically do not ask which factors caused Richard and Mildred Loving’s small Virginia town to have such greatly relaxed segregative norms.<sup>37</sup> *According to Our Hearts*, however, suggests that we should. It calls for an interrogation of the full range of forces that have and still do keep interracial couples apart, as well as those that bring them together.

Even as Onwuachi-Willig details the events of the past in exploring the *Rhineland* trial, she strives to focus on modern interracial couples. This

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33. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CALIF. L. REV. 1, 2 (2006).

34. The work of Renee Romano and some others stands as an important exception, however. See, e.g., RENEE C. ROMANO, RACE MIXING: BLACK-WHITE MARRIAGE IN POST-WAR AMERICA 14–15 (2003).

35. WALLENSTEIN, *supra* note 6, at 215.

36. But see Emens, *supra* note 24 (discussing, *inter alia*, structural impediments to intimacy). See also Robinson, *Structural Dimensions of Racial Preferences*, *supra* note 24 (discussing structural determinants of racial preferences in online dating).

37. But see Pratt, *supra* note 4 (offering personal observations about the social context from which Richard and Mildred Loving hailed).



inquiry involves marshalling an impressive array of survey data, social science research, and narrative, including stories from her own life, to document the “lingering taboo” of cross-racial loving.<sup>38</sup> It also means introducing concepts such as “collective discrimination,” which emphasizes the joint nature of the injury that interracial couples and families suffer in our society.<sup>39</sup> As suggested earlier, however, the discussion of “placelessness” that Onwuachi-Willig conducts arguably stands as the most important dimension of *According to Our Hearts*’ inquiry into the lives of twenty-first century interracial families—families that live at a time when law does not formally prohibit their existence, but nevertheless limits their ability to flourish on equal terms with monoracial families.<sup>40</sup> Ultimately, *According to Our Hearts* speaks directly to issues of structural discrimination and exclusion.

In sheer number of pages, *According to Our Hearts* arguably devotes the most attention to the problem of placelessness in law. Revealing her roots as a critical race theorist, Onwuachi-Willig emphasizes the role of law in “facilitat[ing] the use of race as a determinative [or essential] factor in the construction of families” through institutions such as marriage or formal relationships created through legal mechanisms such as adoption.<sup>41</sup> The law, she argues, essentially “fram[es] . . . the monoracial and heterosexual family as the normative ideal . . . .”<sup>42</sup> To that extent, it promotes the erasure and “placelessness” of interracial relationships, especially those that are black-white and/or gay or lesbian.<sup>43</sup> The privileging of monoraciality and heterosexuality, and comparative indifference to interraciality and homosexuality in the intimate realm, Onwuachi-Willig explains, effectively renders multiracial families invisible in the eyes of the law.<sup>44</sup>

Interestingly, Onwuachi-Willig proposes to address this legal invisibility with more, or at least better, law. Specifically, she proposes that the term “interraciality” be added to statutes such as Title VIII of the Civil Rights Act of 1968, which addresses racial discrimination in housing, as a

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38. ONWUACHI-WILLIG, *supra* note 10, at 143.

39. Onwuachi-Willig defines “collective discrimination” as “[p]unishments for crossing racially defined boundaries of intimacy.” *Id.* at 199. It “includ[es] but [is] not limited to [forms of] harassment, the denial of promotions and other advancements, and even the loss or the denial of a job.” *Id.*

40. *See id.* at 156–57.

41. *Id.* at 151–53.

42. *Id.* at 157.

43. *Id.* at 172.

44. ONWUACHI-WILLIG, *supra* note 10, at 172.

way of ensuring the place of interracial families in law.<sup>45</sup> As currently drafted, Title VIII and also Title VII of the Civil Rights Act of 1964—which addresses, *inter alia*, racial discrimination in employment<sup>46</sup>—presume the monoraciality of potential plaintiffs, to the extent that they fail to account textually for the intersectionality of individual and collective identities. Onwuachi-Willig's proposal would effect only a modest change in statutory language. But, it would presumably increase the range of effective civil rights protections available to multiracial families by referring directly to the ground on which they, as a unit, experience discrimination. In this sense, the proposal, while “modest,” could produce significant change.<sup>47</sup>

Having said this, the expansion of targeted civil rights protections for interracial couples may prove to be *According to Our Hearts'* least significant scholarly contribution. Proceeding from the proposition that society should no longer be permitted “to ignore the very social and legal cues and norms that govern our cross-racial and same-sex interactions,” the book seeks essentially to demonstrate that multiracial families—gay or straight—are families too.<sup>48</sup> Onwuachi-Willig argues that the presumption of legitimacy accorded to monoracial families should also extend to these “[r]acial transgressors”; that they too are deserving of respect.<sup>49</sup> In effect, her real ambition is to change how we think about and conceptualize interracial couples and families in the United States. *According to Our Hearts* seeks to carve out a place for interracial families not only in law, but in our collective consciousness.

A discussion of residential segregation and the placelessness of interracial families within our communities, notably, proves to be one of the most important vehicles in the book for achieving this important goal. In contrast to other scholars, Onwuachi-Willig seizes immediately on the spatial dimensions of interracial intimacy in the United States. She confronts head-on the problem of residential segregation and what it means for interracial families.<sup>50</sup>

Underscoring the extent to which “the lives of Alice and Leonard Rhinelander remain relevant in today's society,” the book documents the discrimination and dislocation that interracial families face in the housing

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45. Civil Rights Act of 1968, tit. VIII, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 42 U.S.C. §§ 3601–3619 (2006)); ONWUACHI-WILLIG, *supra* note 10, at 22.

46. Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e (2006)).

47. ONWUACHI-WILLIG, *supra* note 10, at 22.

48. *See id.* at 157.

49. *Id.* at 202.

50. *Id.* at 187–203.

context by briefly returning to the story of the *Rhineland* case.<sup>51</sup> Chapter Six, which introduces the concept of “placelessness,” lays out the challenges that selecting a place to live posed for the couple.<sup>52</sup> It notes, significantly, that “Alice and Leonard did not live on their own after their marriage—despite Leonard’s wealth and ability to purchase a place for the newlyweds.”<sup>53</sup> Instead, with one exception, they lived with Alice’s parents, themselves an interracial couple.<sup>54</sup> The book suggests that this did not reflect the couple’s preferences so much as their perceptions of “the area’s segregated topography”<sup>55</sup> and the realities of “race- and class-segregated New York.”<sup>56</sup> Alice and Leonard “existed within an American landscape that had no real, recognized spaces for them and their lives.”<sup>57</sup> They restricted their housing choices to New Rochelle, New York—a suburb more diverse than others in the predominantly white Westchester—and, even more specifically, to the home in which Alice was raised, because they understood those spaces, in contrast to others in the region, to be ones in which interraciality was tolerated, if not accepted.<sup>58</sup>

*According to Our Hearts* argues that location matters in similar ways for modern interracial couples. Years after the decision in *Loving*, interracial couples and families must engage in the same calculus about “place” or home that Alice and Leonard applied. Indeed, where to live is a choice with serious consequences for interracial couples and families.<sup>59</sup> Obviously, no formal laws bar them from settling in a particular area. But *According to Our Hearts* makes it clear that they must nevertheless contend with a host of issues in identifying a place to live. One of these is discrimination. Practices meant to exclude interracial couples and families from certain residential areas remain common.<sup>60</sup> The book, for example, briefly examines the experiences of “John and Vernon, a black-white same-sex couple in a civil union,” whom Onwuachi-Willig interviewed.<sup>61</sup> In seeking a place to live, they reported having specifically “been steered away from certain

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51. *Id.* at 121.

52. *Id.* at 156–98.

53. ONWUACHI-WILLIG, *supra* note 10, at 185.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 186.

58. *See id.* at 185–87.

59. ONWUACHI-WILLIG, *supra* note 10, at 173–74.

60. *Id.*

61. *Id.* at 188.

neighborhoods because of race, ethnicity, and sexuality.”<sup>62</sup>

Importantly, the burden imposed upon interracial couples and families in this area is not limited to discrimination of this sort. Hypersegregated neighborhoods, where groups such as African Americans and whites are “uniquely isolated” from one another, also pose a significant problem.<sup>63</sup> Such spaces send strong messages about who belongs in certain spaces.<sup>64</sup> These messages, especially when combined with the physical barriers to interaction that segregation poses, may “serve as [an] obstacle[] to the initial meetings between two potential partners that can blossom into long-term, committed interracial relationships.”<sup>65</sup> Even more, they work to limit significantly the options of those interracial couples and families that manage to form in spite of de facto segregation.

To the extent that “messages about race, place, and space work to promote and encourage monoraciality among families,”<sup>66</sup> they may discourage multiracial families from settling in some communities. Parents, for example, may select a community based in part on the reception that they think that their multiracial children will receive. Indeed, research indicates that, like Alice and Leonard, “households headed by [b]lack-[w]hite couples will avoid the most segregated neighborhoods and congregate instead in places where there is already willingness to traverse racial boundaries.”<sup>67</sup> Lamentably, even the choice of such communities will not ensure full acceptance and belonging, as demonstrated by the personal story that Onwuachi-Willig tells about being deemed ineligible for a municipal home loan program designed to promote diversity because her and her husband’s black-white interracial family would “take the street [on which they sought to purchase a home] outside of a 60 percent–40 percent, black-white balance.”<sup>68</sup> *According to Our Hearts* makes it clear that multiracial families in the twenty-first century must still struggle to “find a space for themselves among . . . rigid demarcations.”<sup>69</sup>

By offering such a full account of the experiences of interracial families, *According to Our Hearts* offers real hope that this will one day

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62. *Id.*

63. *Id.* at 124.

64. *Id.* at 187.

65. ONWUACHI-WILLIG, *supra* note 10, at 189. In making this point, Onwuachi-Willig draws explicitly on the work of Renee Romano. See, e.g., ROMANO, *supra* note 34.

66. See ONWUACHI-WILLIG, *supra* note 10, at 189.

67. *Id.* at 191 (internal quotation marks omitted) (quoting Richard Wright, Mark Ellis & Steven Holloway, *Where Black-White Couples Live*, 32 URB. GEOGRAPHY 1, 2 (2011)).

68. *Id.* at 193.

69. *Id.* at 191.

change. As previously noted, Onwuachi-Willig does not necessarily describe herself as engaged in a structuralist inquiry as she devotes attention to the multiple dimensions of place and placelessness for multiracial couples and families. But I submit that she should be credited with such an analysis. *According to Our Hearts* provides much-needed insight into the embedded systems and structures that operate to marginalize and discriminate against interracial couples and families. In doing so, it administers a potent antidote to the placelessness in the law and residential spaces that interracial couples and families suffer. An already-accomplished scholar, Onwuachi-Willig succeeds in offering a preliminary sketch of a structuralism-informed agenda for legal scholars interested in the role that legal structures and systems play in limiting opportunities for interracial intimacy. In the Part that follows, I suggest just one of the avenues that an explicitly structural approach opens up and the ways in which it could deepen our understanding of interracial intimacy today.

### III. THE RHINELANDER TRIAL AS A TALE OF RACE AND SPACE

Actor Morgan Freeman caused a firestorm recently when he asserted that President Barack Obama—whose election to the presidency in 2008 was widely celebrated as a major civil rights milestone, the fulfillment of decades of struggle by African-American leaders such as Dr. Martin Luther King, Jr.—is, in fact, not black, but “mixed-race.”<sup>70</sup> In a National Public Radio interview, Freeman said that the

[f]irst thing that always pops into my head regarding our president is that all of the people who are setting up this barrier for him . . . they just conveniently forget that Barack had a mama, and she was white—very white American, Kansas, middle of America . . . There was no argument about who he is or what he is. America’s first black president hasn’t arisen yet. He’s not America’s first black president—he’s America’s first mixed-race president.<sup>71</sup>

Interestingly, Freeman’s comments resonate deeply with themes explored by Onwuachi-Willig in *According to Our Hearts*. They of course align nicely with the concerns about the invisibility of multiracial identities in law, but also our collective understanding addressed in the previous Part. But also underlying Freeman’s comments, whether one agrees with them or not, lies a recognition of the problem of racial identification in American society. Onwuachi-Willig, as noted earlier, explores this issue in great detail in her book. The extent to which a black man or woman might not be

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70. *Morgan Freeman: No Black President for the U.S. Yet*, NPR (July 3, 2012, 3:24 PM), <http://www.npr.org/2012/07/05/156212527/morgan-freeman-no-black-president-for-us-yet>.

71. *Id.*

recognized as the parent of their mixed-race child is explored in the book and highlights the complexity inherent in trying to identify race, as does the discussion of the *Rhineland* trial. Onwuachi-Willig helps her readers see that the central difficulty presented by Leonard's annulment suit was how to best identify or understand race. Indeed, the physical examination of Alice's body by the *Rhineland* jury,<sup>72</sup> the efforts to interrogate Alice's reputation and circle of associates made by the attorneys involved,<sup>73</sup> and the singular focus on Alice's darker-skinned father's racial lineage—even though she, like President Obama, also had a “white mama”—while certainly remarkable within the context of the *Rhineland* case, comprise a set of identification tools that were regularly deployed in race trials dating back to slavery.<sup>74</sup>

In this Part, I want to highlight another matter that could easily have influenced how Alice's race was identified in the *Rhineland* trial—the question of race and space. As noted in Part II, we so often overlook the relevance of spatial issues when talking about race and interracial relationships, in particular.<sup>75</sup> But attention to the interaction of race and space is key to any structuralist account of race and disadvantage in this country. In the pages that follow, I seek to demonstrate how a more explicit commitment to structuralism and the spatial dimensions of race could add definition to the already vivid picture of the *Rhineland* case and modern interracial relationships that Onwuachi-Willig paints in *According to Our Hearts*. I suggest that the realities of race and space in 1920s Westchester County, while perhaps less sensational than the slave auction-style disrobing of Alice's body, could easily have influenced the jury's conclusion that Alice was obviously black.

### A. The Problem of Racial Space

Scholars have increasingly begun to focus on the salience of spatial concerns in understanding race and cumulative disadvantage in the United States. Inquiries into racial segregation and its practical consequences for African Americans and other minorities have been an important dimension

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72. ONWUACHI-WILLIG, *supra* note 10, at 15.

73. *See id.* at 45–51.

74. *See id.* at 44–45, 54–55. For work on how issues of racial identification played out in early race trials, see Angela Onwuachi-Willig, *Multiracialism and the Social Construction of Race: The Story of Huggins v. Wright*, in *RACE LAW STORIES* (Devon W. Carbado & Rachel F. Moran eds., 2008). For a recent book providing a comprehensive discussion of this issue, see DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA* (2013).

75. *See supra* pp. 747–53.

of this work.<sup>76</sup> Over time, however, legal scholars have also begun to focus on the precise role of law in perpetuating inequality and, most importantly for the instant discussion, shaping the meaning of racially isolated spaces.<sup>77</sup> These scholars emphasize the extent to which “law [has] tend[ed] either to downplay or to overlook the racial identifiability and associated cultural meaning of . . . space,”<sup>78</sup> citing cases such as *City of Memphis v. Greene*<sup>79</sup> and *Village of Arlington Heights v. Metropolitan Housing Development Corporation*<sup>80</sup>—decisions in which the United States Supreme Court declined to find actions such as road closings or exclusionary zoning policies constitutionally actionable.<sup>81</sup>

Professor Elise Boddie’s article *Racial Territoriality* provides a useful example of this body of scholarship. Professor Boddie argues that antidiscrimination law should be retooled to take account of the full range of racial harms that attend the exclusion of blacks and other racial minorities from predominately white geographical spaces.<sup>82</sup> In particular, it asserts that the existing doctrine “should place significant emphasis on the ‘whiteness’ of a subject space in judging racial discrimination claims that involve the spatial exclusion of people of color.”<sup>83</sup> Boddie contends that incidents such as the 2005 exclusion of hundreds of primarily black Hurricane Katrina survivors by police officers from the town of Gretna, Louisiana are not necessarily what they appear to be on the surface.<sup>84</sup> Existing doctrine would not treat the decision by police officers to block black refugees from passing over the bridge that would have permitted them safely to escape the post-Katrina devastation of New Orleans as constitutionally problematic, despite

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76. See, e.g., Michelle Adams, *Radical Integration*, 94 CALIF. L. REV. 261 (2006); Daira Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL’Y & L. 197 (2004).

77. Boddie, *supra* note 32; Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1849 (1994); John A. Powell, *Structural Racism: Building upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 796 (2008) [Powell, *Structural Racism*].

78. Boddie, *supra* note 32, at 405 (emphasis added).

79. *City of Memphis v. Greene*, 451 U.S. 100 (1981).

80. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

81. See Boddie, *supra* note 32, at 414–20.

82. *Id.* at 405–07.

83. *Id.* at 405–06.

84. *Id.* at 405. In the wake of Hurricane Katrina, hundreds of storm evacuees from New Orleans, the vast majority of them African American, sought refuge in neighboring towns and suburbs. But they were often met with opposition by authorities reluctant to admit the crowds into their jurisdictions. Gardiner Harris, *Police in Suburbs Blocked Evacuees, Witnesses Report*, N.Y. TIMES, Sept. 10, 2005, [http://www.nytimes.com/2005/09/10/national/nationalspecial/10emt.html?\\_4=0](http://www.nytimes.com/2005/09/10/national/nationalspecial/10emt.html?_4=0). See also Boddie, *supra* note 32, at 402–03 (discussing exclusion of black evacuees from Gretna, Louisiana).

the fact that some of the police officers vowed that “[Gretna’s] West Bank was not going to become New Orleans and there would be no Superdomes in their city.”<sup>85</sup> In effect, the absence of overtly racial language or race-based decision-making would immunize the officers from judicial sanction. But, as Boddie argues, the Supreme Court’s emphasis on intentionality in its race cases overlooks the racial character and meaning of our geographic spaces, ensuring that certain racially exclusionary actions can occur without recourse.<sup>86</sup> The hypersegregation that exists in the United States effectively means that geographic references, by definition, function as racial codes.<sup>87</sup> Statements like the ones made by the Gretna officers thus necessarily communicate racial meaning, if not a desire to protect predominantly white spaces from infiltration by non-whites, in ways that exclude and impose significant harms on racial minorities.

Notably, *Racial Territoriality*, which draws heavily on social science research, advances an understanding of racial space very relevant to Onwuachi-Willig’s study of *Rhineland v. Rhineland* and interracial couples and families. It conceives of “racialized spac[e] . . . [as] more than a physical set of boundaries or associations.”<sup>88</sup> Such space functions as a signifier of racial identity and cultural norms.<sup>89</sup> Where “they are inhabited, occupied, or frequented principally by one race and are claimed or treated as spaces that are only for individuals from that racial group,”<sup>90</sup> geographic spaces like predominantly white Gretna or predominantly black New Orleans communicate information about the people who inhabit them and serve to “reinforce cultural norms about spatial belonging and power.”<sup>91</sup> They serve to “make” race, to cast certain categories and imposed identities as “natural” or preordained,<sup>92</sup> and to “reinforce racial attitudes and prejudices.”<sup>93</sup>

To the extent that geographic space can not only structure opportunities

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85. Boddie, *supra* note 32, at 402 (internal quotation marks omitted) (quoting Aaron Sharockman, *Neighboring Town Denied Evacuees*, ST. PETERSBURG TIMES (Sept. 17, 2005), [http://www.sptimes.com/2005/09/17/Worldandnation/Neighboring\\_town\\_deni.shtml](http://www.sptimes.com/2005/09/17/Worldandnation/Neighboring_town_deni.shtml)).

86. *See id.* at 421–22.

87. *See id.* at 409–10.

88. *Id.* at 438.

89. *Id.*

90. *Id.* at 449.

91. Boddie, *supra* note 32, at 438.

92. David R. James, *The Racial Ghetto as a Race-Making Situation: The Effects of Residential Segregation on Racial Inequalities and Racial Identity*, 19 LAW & SOC. INQUIRY 407, 420 (1994).

93. *Id.* at 412.



based on race, as Onwuachi-Willig discusses at length in Chapter Six, but identify race in some measure, it makes sense to consider here the role that racial space might have had in the *Rhineland* trial itself. The section that follows begins that process. It engages in a brief structural analysis designed to highlight aspects of the racial terrain of 1920s Westchester County that could have been salient to jurors' assessments of Alice's claim of blackness.

### *B. The Operation of Race and Space in the Rhineland Trial*

*According to Our Hearts'* vivid description of the *Rhineland* trial makes it plain that the jurors tasked with deciding the facts pertinent to Leonard Rhineland's annulment suit had a variety of evidence to consider in assessing the veracity of Leonard's claim that he had been deceived about the true nature of his wife's racial background. The trial record shows that, in addition to "Alice's bare body,"<sup>94</sup> this evidence encompassed love letters exchanged by Alice and Leonard during their courtship,<sup>95</sup> photographs,<sup>96</sup> testimony about their social relationships, and information about the family ancestry.<sup>97</sup> It also included official documents such as the couple's marriage license, birth certificates, driver's licenses, and naturalization papers, which were proffered to prove biological race.<sup>98</sup> Here, I want to suggest that it also included informal cultural information about the geographic space that Alice inhabited as a woman of color.

Of course, we can never know with certainty the ways in which cultural knowledge of geographic space might have informed the task of racial identification with which the *Rhineland* jurors were charged. Even if we had the opportunity to interview one of the white men empanelled on the jury in that trial, it is not entirely clear that they could talk at length about the meaning of racial space or the factors influencing their assessment of Alice's racial identity. The "subtle biases [serve to] create[] and recreate[] . . . racialized environmental feedback loop[s] that, although often . . . acutely experienced" by minorities and non-minorities alike,<sup>99</sup> are often "unconscious."<sup>100</sup>

The point of the following exercise is not to state definitively the ways in which racial space affected the results in *Rhineland*. Rather, it is to

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94. ONWUACHI-WILLIG, *supra* note 10, at 13.

95. *Id.* at 4.

96. *Id.* at 45.

97. *Id.* at 46.

98. *Id.* at 44.

99. Boddie, *supra* note 32, at 446 (internal quotation marks omitted).

100. *Id.* (internal quotation marks omitted).

suggest ways in which geographic considerations might have played a role in those proceedings. In so doing, this Part seeks, once again, to demonstrate the potential of analyses explicitly focused on structural concerns when it comes to interraciality and questions of racial identification.

At first blush, the nature of race relations within New Rochelle, New York—the place where Alice grew up and Leonard briefly made his home—might raise questions about the value of the geographic inquiry proposed. Onwuachi-Willig highlights spaces of racial fluidity and diversity within New Rochelle when discussing Alice's family, housing options in the area, and the purported frequency with which Alice and others were reported to socialize across racial lines.<sup>101</sup> But the possible existence of such spaces in no way undermines the contention that, overall, boundaries within the hamlet were racialized. The "racial identity of space—how it is perceived by those who inhabit, occupy, or claim it and those who do not—is contingent and subject to competing interpretations."<sup>102</sup> In other words, a "city's racial image is not necessarily uniform . . . ."<sup>103</sup> As Boddie noted in discussing the Gretna, Louisiana incident mentioned earlier, "despite the prevailing image of New Orleans as identifiably black, closer examination might reveal a more complex and nuanced interpretation of the city's racial geography. Different New Orleans neighborhoods, for example, might convey different racial meaning and have different racial associations."<sup>104</sup> A city's racial identity, because "it is . . . internally . . . managed according to the circumstances . . . is [necessarily] context-dependent."<sup>105</sup>

Further, even the examples of racially fluid social boundaries properly noted in *According to Our Hearts* do not suggest that New Rochelle—a middle-to-working-class town that sits in Westchester County,<sup>106</sup> one of the nation's first "subdivided suburban archipelago[es]"<sup>107</sup>—was somehow immune from the racial systems and prejudices of the day. In the early decades of the twentieth century, localities throughout the North grappled openly with how best to deal with the exodus of black people who left the South as part of the Great Migration. Many of them resorted to exclusionary zoning and other measures to maintain their jurisdictions as predominantly

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101. See ONWUACHI-WILLIG, *supra* note 10, at 185.

102. Boddie, *supra* note 32, at 450.

103. *Id.*

104. *Id.* (citations omitted).

105. *Id.* at 450–51.

106. Daniel Denvir, *Segregation in the Land of Limousine Liberalism*, SALON.COM (July 1, 2011, 12:01 PM), [http://www.salon.com/2011/07/01/denvir\\_westchester\\_segregation/](http://www.salon.com/2011/07/01/denvir_westchester_segregation/).

107. *Id.*

white.<sup>108</sup> This was especially true of New York City, a major receiving center for black migrants. Even as the Harlem Renaissance kicked into high gear, “New York’s answer to the problems created by the new migration into the city was the confinement of Negroes to Harlem and the system of housing segregation we know today.”<sup>109</sup>

Dynamics within the larger New York region were no different. Westchester County—a destination spot for white elites eager for suburban living since the nineteenth century—was (and, according to some, remains) relentless in the use of exclusionary measures designed to exclude blacks and retain the white racial character of towns such as Scarsdale and Rye.<sup>110</sup> Racially-restrictive covenants served to keep African Americans and other minorities out of local neighborhoods,<sup>111</sup> as the discussion of *Ridgway v. Cockburn*<sup>112</sup>—a case concerning a racially restrictive covenant that highlights the problems inherent in racial identification efforts<sup>113</sup>—that I conducted in an earlier article attests.<sup>114</sup> Similarly exclusionary zoning ordinances, building code provisions, and other segregative mechanisms operated either to exclude minorities from the county entirely or to corral them into certain areas.<sup>115</sup> Between the years 1910 and 1925, “[m]ost minorities in Westchester County . . . lived in [places like] southwest Yonkers and in the nearby cities of New Rochelle, Mount Vernon, and White Plains.”<sup>116</sup> Perhaps not surprisingly, these areas remain among the

108. See Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1542 (2012) (discussing use of racially restrictive covenants during migration of blacks from the South to the North). For an excellent treatment of the Great Migration, see ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA’S GREAT MIGRATION* (2011).

109. Herbert Shapiro, *The Ghetto Is Not Eternal*, 27 PHYLON 303, 304 (1966) (reviewing GILBERT OSOFSKY, *HARLEM: THE MAKING OF A GHETTO* (1965)). Significantly, residential segregation of African Americans existed in some northern communities well before the flow of black migrants from the South intensified. *Id.*

110. *Denvir*, *supra* note 106.

111. *See id.*

112. *Ridgway v. Cockburn*, 296 N.Y.S. 936 (Sup. Ct. 1937).

113. As I explained in a 2008 book chapter on *Perez v. Sharp*, the black defendants in this case challenged the terms of the racially restrictive covenant at issue in their case on the grounds that the category of “Negro” utilized in the covenant was vague and, further, did not apply to Mrs. Ridgway, who identified as multiracial. Lenhardt, *The Story of Perez v. Sharp*, *supra* note 7, at 376–77. I return to *Ridgway* and the issues of racial identification that it raises in an upcoming article concerning claims of racial vagueness in civil rights cases.

114. *See id.* at 376–77.

115. *See id.*

116. Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 325 (2002).

most heavily black and Latino areas in Westchester.<sup>117</sup> This reality has been a point of contention in more than one civil rights suit, including a 2009 federal *qui tam* suit brought against the county for failing to comply with Fair Housing Act requirements, which resulted in a consent decree to which the jurisdiction remains bound.<sup>118</sup>

One does not have to strain too hard to imagine that the jurors empanelled in the *Rhineland* trial, which was held in Westchester County, were aware of these dynamics. They easily could have been influenced, even before seeing Alice's bare breasts, by the racial information that the boundaries of 1920s Westchester County communicated. As one observer commented, "[t]he rigidity of [racial and spatial] boundaries [at this time] signific[d] that American Negroes are Negroes first, foremost, and forever."<sup>119</sup>

Moreover, even if they were unaware of the interplay of race and space at the county level, it is quite possible that the *Rhineland* jurors nevertheless understood how race operated within the borders of New Rochelle itself. While perhaps comparatively more integrated than other Westchester County jurisdictions, New Rochelle at that time was— notwithstanding the “place” that Alice and her multiracial family had carved out for themselves there<sup>120</sup>—plainly a town where race not only had social significance, but was used to mark the boundaries for certain opportunities. For example, the fact that Alice had been employed as a domestic worker<sup>121</sup> arguably could have helped to identify her as black, rather than white. In an essay on the *Rhineland* case that preceded their 2001 book on the subject,<sup>122</sup> Earl Lewis and Heidi Ardizzone cited oral histories of black residents of New Rochelle that help paint a picture of how “consistent [the]

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117. See Jacob Sugarman, *Westchester County's Bumpy Road to Fair Housing*, WESTCHESTER MAG. (Apr. 18, 2012, 11:34 AM), <http://www.westchestermagazine.com/WestchesterMagazine/May-2012/Westchester-Countys-Bumpy-Road-to-Fair-Housing/>.

118. For a discussion of the suit and a critique of the consent decree, see Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act's "Affirmatively Furthering" Mandate*, 100 KY. L.J. 125 (2012). For a discussion of the use of *qui tam* suits as a way of enforcing civil rights protections, see Matthew J. Termine, *Promoting Residential Integration Through the Fair Housing Act: Are Qui Tam Actions a Viable Method of Enforcing "Affirmatively Furthering Fair Housing" Violations?*, 79 FORDHAM L. REV. 1367 (2010).

119. Karl E. Taeuber, *The Problem of Residential Segregation*, 29 PROC. ACAD. POL. SCI. 101, 105 (1968).

120. See ONWUACHI-WILLIG, *supra* note 10, at 204–05.

121. *Id.* at 25.

122. See generally EARL LEWIS & HEIDI ARDIZZONE, *LOVE ON TRIAL: AN AMERICAN SCANDAL IN BLACK AND WHITE* (2001) (discussing the *Rhineland v. Rhineland* trial and its significance).

pattern of domestic servitude” was during that period.<sup>123</sup> Relaying the content of those histories, Lewis and Ardizzone wrote:

When asked what kind of work was available to blacks in New Rochelle, one native New Rochellean, born in 1900, replied that “[i]f you worked in New Rochelle you did domestic work until about 25 years ago. If you had a chauffeur’s job that was considered a top job in those days.” Another remarked that “New Rochelle was never meant for blacks. Rich families . . . hired live-in domestics who discovered New Rochelle while traveling here to do domestic work.” While European immigrants might expect better opportunities for their children and grandchildren, African-Americans and black immigrants found that their employment opportunities continued to be limited in New Rochelle and elsewhere.<sup>124</sup>

Likewise, educational opportunities in New Rochelle appear to have been circumscribed by race for decades. In 1960, African-American parents filed a desegregation lawsuit against the local school board that earned New Rochelle the designation “Little Rock of the North”<sup>125</sup> and produced one of the first post-*Brown v. Board of Education* findings of constitutional violation.<sup>126</sup> *Taylor v. Board of Education*<sup>127</sup> challenged New Rochelle’s maintenance of the Lincoln elementary school as a segregated institution reserved exclusively for black students.<sup>128</sup> Of course, this lawsuit, which required the court to consider the constitutional significance of de facto segregation,<sup>129</sup> came decades after the *Rhineland* trial. But the district court’s finding in *Taylor* that the spatial manipulation that resulted in the Lincoln School being all-black began in the 1930s arguably brings it within the ambit of the instant discussion. The racial gerrymandering in which the district engaged, as well as its operation of a transfer policy that permitted white, but not black, students to leave Lincoln in favor of predominantly white schools, demonstrates the extent to which “color spatialization” had become a part of “the metropolitan landscape” of New Rochelle.<sup>130</sup>

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123. Earl Lewis & Heidi Ardizzone, *A Modern Cinderella: Race, Sexuality, and Social Class in the Rhineland Case*, 51 INT’L LAB. & WORKING-CLASS HIST. J. 129, 133 (1997).

124. *Id.* (citations omitted).

125. Tom I. Romero, II, *Kelo, Parents and the Spatialization of Color (Blindness) in the Berman-Brown Metropolitan Heterotopia*, 2008 UTAH L. REV. 947, 991.

126. *Id.*

127. *Taylor v. Bd. of Educ.*, 191 F. Supp. 181 (S.D.N.Y. 1961).

128. See Irving R. Kaufman, *The New Rochelle Decision: The Facts*, 36 J. EDUC. SOC. 262, 267 (1963); Romero, *supra* note 125, at 993.

129. Romero, *supra* note 125, at 995.

130. *Id.* at 994–95.

Structural mechanisms of the sort at issue in *Taylor* could also have shaded the perspectives of jurors, possibly even without their knowledge.<sup>131</sup>

I could continue along these lines. But I submit that even this limited inquiry makes the point that an even more explicit focus on structural issues such as racialized space can add texture to scholarly analyses in this context. Insights about racial space and other concerns can deepen our understanding of the processes by which racial identification occurs, and even more broadly, appreciation of the many challenges faced by interracial couples and families today. They serve to amplify Onwuachi-Willig's important observations about interraciality and the interplay of law and social norms where constraints on interracial couples and families are concerned.

#### IV. BRINGING "STRUCTURE" TO RESEARCH ON INTERRACIAL INTIMACY AND FAMILIES

Evidence of the interpretative possibilities of a structuralism-based analysis admittedly begs the question of what it would practically mean to integrate structuralist concerns into the study of interracial couples and families. In this final Part, I briefly consider legal scholarship incorporating structuralism that could be brought to bear on studies concerning interracial families and the challenges that they confront in the twenty-first century. This Part then considers specific topics that legal scholars embracing structuralist insights could explore as part of an agenda focused on uncovering the legal systems and structures that contribute to the "placelessness" of interracial couples and families today.

##### *A. Race-Based Structural Discrimination and Intimacy*

In a 2011 article entitled *Race Audits*, I proposed a mechanism for unpacking the systems and structures that produce and perpetuate racial disadvantage, called the "race audit."<sup>132</sup> In explaining the need for such a tool, I discussed the calls for the adoption of a structuralist approach in law by critical race scholars like John Calmore and John A. Powell,<sup>133</sup> as well as other scholars interested in issues of race and equality, including Susan Sturm, Tristin Green, and Samuel Bagenstos.<sup>134</sup> The benefit of a structuralist

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131. See Boddie, *supra* note 32, at 446.

132. Lenhardt, *Race Audits*, *supra* note 22. See also R.A. Lenhardt, *Localities as Equality Innovators*, 7 STAN. J. C.R. & C.L. 265, 269 (2011) [hereinafter Lenhardt, *Localities as Equality Innovators*].

133. See, e.g., John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067, 1091 (1998); Powell, *Structural Racism*, *supra* note 77, at 796–80.

134. See, e.g., Bagenstos, *supra* note 33; Tristin K. Green, *A Structural Approach as*

approach in law is that it

“shift[s] our attention” from intentionality or “intra-institutional”-based analyses—favorites of the current [Supreme] Court—to interrogations of “inter-institutional arrangements and interactions” that better explain the cumulative and multi-generational nature of racial disadvantage. [It] make[s] clear that an exclusive focus on intentionality, by definition, will always be inadequate to address persistent racial inequalities.<sup>135</sup>

For scholars interested in interracial families, however, the problem with this still evolving body of research is that it typically has not engaged with questions of intimacy, let alone interracial intimacy, when discussing the problems of cumulative racial disadvantage. Professor Russell Robinson completed a study of racial preferences in online dating that provides an important exception.<sup>136</sup> Notably, Liz Emens’s 2009 article, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, does as well.<sup>137</sup> Emens’s article makes a contribution by bringing a structural lens to a broad range of intimate issues. Emens contends that we should be concerned about the intimate consequences of “[s]tructural subordination on the basis of race,” as well as its “material consequences.”<sup>138</sup> Deploying a structural lens, she reveals how the state is both active and anything but neutral in influencing preferences and behaviors in the intimate sphere. She explains that “[b]y creating the infrastructure of society, the state shapes the accidents of who meets whom and how,” and also “plays a role in the hierarchy of intimate opportunities by shaping social capital and relative advantages.”<sup>139</sup>

Importantly, Emens engages in a meaningful study of the sources and potential solutions for what she terms “intimate discrimination” in the race context.<sup>140</sup> But Emens’s article, which also explores intimate discrimination on grounds of disability and sex, is not meant to be a deep exploration of race or the challenges facing interracial intimacy. It seems primarily to elucidate the state’s essentially invisible role in setting intimate preferences

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*Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 850 (2007); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 462–63 (2001).

135. Lenhardt, *Localities as Equality Innovators*, *supra* note 132, at 269 (citations omitted).

136. See generally Robinson, *Structural Dimensions of Racial Preferences*, *supra* note 24 (discussing and calling for further research on the impact of structural conditions on intimate preferences, especially those pertaining to race).

137. See Emens, *supra* note 24.

138. *Id.* at 1396.

139. *Id.* at 1309.

140. *Id.* at 1396–1400.

by conducting a comparative analysis that reveals the nature of government action and our own assumptions across three important categories. In sum, the need for legal research that addresses interracial intimacy from an explicitly structural perspective remains pressing.

*B. Identifying Structural Obstacles to Interracial Intimacy and Families*

This Article could not begin to map a comprehensive agenda for legal scholarship trained on structural discrimination in the intimate realm and its impact on interracial couples and families. Its purpose, in addition to celebrating *According to Our Hearts* and the unique contribution that Onwuachi-Willig makes in its pages, is primarily to suggest the need for structural analysis in this area and to make clear the possibilities it offers. That said, this Article would be incomplete without some discussion of what a structural discrimination-focused research agenda might entail.

Importantly, many of the issues raised by Onwuachi-Willig in the course of exploring the experiences of interracial couples and families are ones on which I would also focus. For example, legal scholars need to address further questions about how race-based intimate preferences get expressed online and the role of housing policy and policing in shaping opportunities for families. As previously indicated, I envision a process of interrogation by race and family law scholars in this area that even more directly implicates structuralism. The question, of course, is exactly what such a process would entail.

To begin, we must, taking a page from Onwuachi-Willig's own playbook, first seek answers to current challenges by better understanding the past. Despite the concern that I earlier expressed about the almost singular focus on antisegregation law, I would encourage scholars to reexamine bans on interracial intimacy, but to do so in a way that highlights the structural implications of such prohibitions. The previously-mentioned research of Professor Reginald Oh regarding segregation could be a natural starting point for this kind of work.<sup>141</sup> So too could judicial cases raising questions about the link between segregation and attitudes toward cross-racial intimacy.

Consider, for example, the Fourth Circuit's 1930 decision in *City of Richmond v. Deans*.<sup>142</sup> *Deans* involved a constitutional challenge to a Richmond ordinance, the explicit purpose of which was "[t]o prohibit any person from using as a residence any building on any street between intersecting streets where the majority of residences on such street are

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141. See generally Oh, *supra* note 8.

142. *City of Richmond v. Deans*, 37 F.2d 712 (4th Cir. 1930).



occupied by those with whom said person is forbidden to intermarry.”<sup>143</sup> The ordinance reflected an attempt by Richmond officials to circumvent the United States Supreme Court’s decision in *Buchanan v. Warley*,<sup>144</sup> which held that a jurisdiction’s police power could not justify unconstitutional, race-based interferences with the “right to own and dispose of property.”<sup>145</sup> That provision, which the Supreme Court ultimately invalidated, was obviously designed to preserve the racial character and social order of Richmond’s neighborhoods. But it also encompassed other, more ambitious goals. The ordinance also functioned to reduce the possibility that intimate relationships like Alice and Leonard’s could ever develop. In this sense, the Richmond ordinance, and others like it enacted across the South, revealed a not-so-closely-held secret about life in the Jim Crow South. Residential segregation was about more than the racial identifiability of neighborhoods and house values. Like antisegregation laws, residential segregation served to punish interracial intimacy and those inclined to form interracial families at the core of *According to Our Hearts*.<sup>146</sup>

We could learn a great deal more by further interrogating the race and gender subordination effected by race-based “school segregation, . . . antisegregation laws,” and segregation more broadly.<sup>147</sup> Even more, exploring the intersection of antisegregation law and other forms of government discrimination on the basis of race could also be very productive. Such an inquiry could, for example, identify the ways in which antisegregation and residential segregation laws have not just been independent, equally important forces in this area, but may actually have been mutually constitutive of modern-day obstacles to loving in this context.

In this connection, I encourage scholars to examine modern burdens to interracial intimacy, like employment or housing, and to explore opportunities to drill down on the systems and structures that enable discrimination in those realms. In addition to a focus on Title VIII, for example, we could do more to explore the ongoing implications of restrictive covenants and exclusionary zoning—like the policies now being

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143. *Id.* at 713 (internal quotation marks omitted).

144. *Buchanan v. Warley*, 245 U.S. 60 (1917).

145. David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 799 (1998).

146. In advancing this argument, I build on the important work of Professor Oh, who argued that the separation of races in public schools and other social spaces, such as pools, beaches, or restaurants was designed to prevent interracial intimacy. See Oh, *supra* note 8, at 1339–40. Deans, I think, reveals that the campaign to impede interracial intimacy was even more extensive than even Oh suggests.

147. *Id.* at 1323.

debated in Westchester County and other areas—for interracial intimacy.<sup>148</sup> And, as Part IV makes clear, legal scholars would do well to focus more on the problem of spatiality and race, even in the online world.<sup>149</sup> We can explore the impact that racialized space has in setting intimate preferences and ask questions about the impact that, for example, policies designed to regulate those spaces have on the stigmatic meaning accorded to race, as Bennett Capers does in his work.<sup>150</sup>

Additionally, we can begin to ask harder questions about the ways in which issues of space and race influence ideas about interracial families and parenting. Consider, for example, the problem of black mothers being mistaken for the nannies of their interracial children, an issue that Onwuachi-Willig explores in her book, but that has also gotten attention in popular publications such as *Essence* Magazine.<sup>151</sup> The nanny dilemma, quite clearly, is in part about racial identification and the presumed naturalness of racial categories, as Onwuachi-Willig notes.<sup>152</sup> But in a very real sense, it is also a problem of racial space. The racial identifiability of some spaces makes it impossible for some to imagine not only that interracial family configurations exist, but that a black woman would have any reason but her job as a nanny for being in a predominantly white neighborhood or area. We need to better understand the reasons why this is so. At the same time, we also need to comprehend the characteristics of certain spaces that significantly reduce the likelihood that such a misidentification occurs. In other words, are there things that might make the Upper East Side of New York City different than, say, Newark, New Jersey, or even some of the more racially diverse suburbs that surround it?

Further, scholars interested in questions pertaining to the interracial family could do more to explicate the concrete harms imposed by discriminatory laws and policies. Onwuachi-Willig advances the ball immensely by introducing concepts such as “placelessness” and “collective discrimination.”<sup>153</sup> But more can be done to explicate the burdens imposed. To wit, scholars could do more to integrate research from other disciplines into their work. Sociologists, for example, have long adopted a structural lens in thinking about interracial intimacy.<sup>154</sup> Identifying legal systems that

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148. For more on the need for such an inquiry, see Lenhardt, *Race Audits*, *supra* note 22.

149. See Robinson, *Structural Dimensions of Racial Preferences*, *supra* note 24.

150. See I. Bennett Capers, *Policing, Place, and Race*, 44 HARV. C.R.-C.L. L. REV. 43 (2009).

151. See Veronica Chambers, *I'm Her Mother, Not Her Nanny*, ESSENCE MAG., June 2010, at 106.

152. See ONWUACHI-WILLIG, *supra* note 10, at 179–80.

153. See *id.* at 156, 199.

154. See, e.g., Kevin M. Fitzpatrick & Sean-Shong Hwang, *The Effects of Community*

promote or inhibit cross-racial impact across a range of domains could be very useful and would complement such work.<sup>155</sup>

Likewise, much more can be done to identify effective remedies or solutions for the harms imposed on interracial families. Onwuachi-Willig's proposal to integrate the term "interraciality" into existing civil rights provisions carries expressive force and has the benefit of being relatively simple to implement.<sup>156</sup> But are there other remedies that we might explore? In a 1981 housing desegregation case, a court mandated the use of advertisements including blacks as a way of responding to collective discrimination against such individuals.<sup>157</sup> Likewise, a recent employment discrimination suit against the clothing store Abercrombie & Fitch resulted in a settlement requiring more diverse advertising.<sup>158</sup> Are there similar remedies that could also be adopted? Should we explore more affirmative measures for encouraging interracial loving in the absence of such violations? What about social programs that seek to encourage diversity and, in some cases, to attract interracial couples and families in particular through housing loan or tax credit offers? Which programs have been most effective? Which programs, like the initiative from which Onwuachi-Willig and her husband were excluded, have provisions that actually amplify the segregative effects on interracial families?<sup>159</sup> Legal scholars need to turn their attention to such issues to develop an understanding of effective practices and policies in this context.

Finally, scholars concerned about interracial families might benefit from exploring more closely other types of cross-racial relationships and the legal structures that inhibit or promote them. Specifically, I contend that looking at interracial friendships could be an important starting point for scholars interested in questions of romantic intimacy. Legal scholars have focused on questions of friendship in recent years.<sup>160</sup> But these studies seem always to give short shrift to the salience of race. Likewise, fixes for the comparatively low incidence of interracial marriage, especially black-white

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*Structure on Opportunities for Interracial Contact: Extending Blau's Macrostructural Theory*, 33 SOC. Q. 51 (1992).

155. See, e.g., Mark Ellis et al., *Work Together, Live Apart? Geographies of Racial and Ethnic Segregation at Home and at Work*, 94 ANNALS ASS'N AM. GEOGRAPHERS 620 (2004).

156. See ONWUACHI-WILLIG, *supra* note 10, at 264.

157. See *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981) (affirming housing discrimination remedy requiring, *inter alia*, advertising housing opportunities in black neighborhoods).

158. See Russell K. Robinson, *Casting and Caste-ing: Reconciling Artistic Freedom and Antidiscrimination Norms*, 95 CALIF. L. REV. 1, 43 n.218 (2007).

159. See ONWUACHI-WILLIG, *supra* note 10, at 193.

160. See, e.g., Ethan J. Lieb, *Friendship & the Law*, 54 UCLA L. REV. 631 (2007); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

marriages, often get offered without any thought at all to the problems that impede the same configuration of friendship.<sup>161</sup> While non-romantic relationships are, of course, not the same as romantic ones, I maintain that structural inquiries into barriers to the former could produce important information about obstacles to the latter.

#### V. CONCLUSION: EXPANDING RESEARCH ON RACE, PLACE, AND FAMILY

In sum, *According to Our Hearts* is a triumph. It makes a substantial contribution to legal scholarship and thinking about interracial couples and families in the twenty-first century, and secures a place for *Rhineland v. Rhineland* in the race canon.<sup>162</sup> In this Article, I have attempted to show that Onwuachi-Willig has also advanced research in this area by making clear the need for a scholarly focus on structural obstacles to interracial intimacy. Such an emphasis can greatly enhance our understanding of the experience and needs of interracial families at a time when interracial marriage, while perhaps not increasing at the rates one might expect, is on the rise.

Significantly, Onwuachi-Willig's ambitious study of interracial couples and families does not pretend to address problems of race and family more broadly. Those issues fall outside of the purview of *According to Our Hearts*. But it bears noting that the structural analysis underlying her important book also arguably maps out avenues for more directly addressing the systems and structures that adversely affect how we view families in general. As I read the portions of the book on housing discrimination and segregation, in particular, I was reminded of a presentation delivered by two family advocates whom I invited to speak to my family law class several years ago. The two women, both white, sought to highlight the different treatment accorded families who are poor, or black, or Latino by recounting their own experiences as new mothers. While their class status and racial identity ordinarily would not subject either woman to stigma or, more importantly, increased scrutiny by state agencies, the fact that one woman lived in a racially-identifiable neighborhood in a poor area of New York City meant that she could not escape the adverse treatment that families of color suffer at the hands of child welfare agencies and other state agencies.<sup>163</sup>

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161. But see Brent Berry, *Friends for Better or for Worse: Interracial Friendship in the United States as Seen Through Wedding Party Photos*, 43 DEMOGRAPHY 491 (2006).

162. For a discussion of this canon, see Devon W. Carbado & Rachel F. Moran, *Introduction: The Story of Law and American Racial Consciousness—Building a Canon One Case at a Time*, in RACE LAW STORIES 1–36 (Devon W. Carbado & Rachel F. Moran eds., 2008).

163. See generally DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (discussing the negative impact of the child welfare system on African-American

Upon giving birth to her child, this woman received a visit from child welfare officials designed to determine whether she utilized drugs, had secured child care for her infant, and had sufficient food to ensure its development. In contrast, her colleague, who gave birth to a child around the same period, but lived in an upper-class, predominantly white neighborhood in another part of the city, received no similar visit. Together, her class, race, and spatial location rendered her a presumptively fit parent, while her co-worker, by dint of the racial identity and class status of those families among whom she lived, was regarded as something much less than that.

The point I make here is not that all state involvement in families is problematic. Clearly, that is not the case. The point of this intervention is simply to highlight that spatiality and the negative messages about race communicated by certain systems and structures have salience outside the interracial family context on which Onwuachi-Willig rightfully focuses our attention. Structural concerns apply with equal force in the context of monoracial families and extend to questions bearing on the ability of families of all backgrounds to flourish.<sup>164</sup> Legal scholars would do well to internalize this reality in examining some of the questions of race and family addressed in this Article, as well as in Professor Onwuachi-Willig's excellent book.

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families).

164. See, e.g., Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 428 (2012) (discussing, *inter alia*, structural barriers to marriage for African Americans and other minorities).